

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COLMEN CAPITAL ADVISORS, INC., : CIVIL ACTION

v.

No. 03-6849

POLAR PLASTICS, INC., ET AL.

POLAR PLASTICS, INC., ET AL.

v.

**COLMEN CAPITAL ADVISORS, INC., :
PETER COLELLA, JR., GEORGE :
BROWN, III, JAMES HELLAUER :
and ELLIOT L. GOLDMAN :**

AND NOW, this 26th day of July, 2005, after a nonjury trial at which it had the opportunity to observe the demeanor of the witnesses and to evaluate their credibility and testimony, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Colmen Parties

1. Colmen Capital Advisors, Inc. ("Colmen"), is a Pennsylvania corporation with its principal place of business in Wayne, Pennsylvania.

2. Colmen engages in "turnaround management" and advice for businesses. Tr. 11/18/04 at 9-10.

3. In providing turnaround management, Colmen assembles a team of professionals, all independent contractors, to evaluate a company's operations,

recommend changes and operate the company until it improves. Tr. 11/18/04 at 9-10.

4. Peter J. Colella ("Colella"), a Pennsylvania citizen, is the founder, sole shareholder and Managing Director of Colmen. Tr. 11/18/04 at 10-11; *Stip. of Uncontested Facts* ¶¶ 15-16.

5. George Brown, III ("Brown"), a Pennsylvania citizen, was an independent contractor engaged by Colmen to serve as the chief operating officer of Polar NC. Tr. 11/18/04 at 10; *Stip. of Uncontested Facts* ¶ 17.

6. Elliot L. Goldman ("Goldman"), who was Senior Vice President at Colmen, is Pennsylvania citizen. *Stip. of Uncontested Facts* ¶ 18.

The Polar Parties

7. Polar Plastics Inc. ("PPI"), a privately-held Delaware corporation with a registered office in Delaware, is the nonoperating parent company of Polar NC. Tr. 11/24/04 at 32-33; *Stip. of Uncontested Facts* ¶ 1.

8. Polar Plastics, (NC), Inc. ("Polar NC"), a wholly owned subsidiary of PPI, is a privately-held North Carolina corporation based in North Carolina. Tr. 11/24/04 at 33; *Stip. of Uncontested Facts* ¶ 2.

9. Polpart Placements Inc. ("Polpart"), a privately-held Canadian corporation, is the nonoperating parent company of Polar Plastic Ltd. ("PPL"), also a Canadian corporation. Tr. 11/24/04 at 33; *Stip. of Uncontested Facts* ¶ 6.

10. 3488161 Canada Ltd. ("3488161"), a nonoperating privately-held Canadian holding company with headquarters in Ontario, Canada, owns 100 shares of common stock of Polpart and 200 shares of common stock of PPI. Tr. 11/24/04 at 34; *Stip. of Uncontested Facts* ¶¶ 9-10.

11. Eric Cohen (“Cohen”) and Andrew Liebmann (“Liebmann”), Canadian citizens who founded the Polar businesses, each own 50 percent of the 3488161 stock. Tr. 11/24/04 at 34; Polar Ex. 92; *Stip. of Uncontested Facts* ¶¶ 9-12.

12. PPL manufactures single usage disposable plasticware (plastic cups, plates, bowls, forks, spoons, knives, etc.) for sale primarily in Canada. *Stip. of Uncontested Facts* ¶ 7.

13. Until it sold its assets in November 2003, Polar NC manufactured single usage disposable plasticware (plastic cups, plates, bowls, forks, spoons, knives, etc.) for sale primarily in the United States. *Stip. of Uncontested Facts* ¶ 2.

14. Polar NC is no longer operating any business and is only paying debts and collecting receipts. *Stip. of Uncontested Facts* ¶ 5.

The Contract

15. For several years prior to Colmen’s involvement, the Canadian operating company, PPL, had been infusing the American operating company, Polar NC, with money because Polar NC was losing money. Tr. 11/24/04 at 45-47.

16. Polar NC could not find competent employees; had difficulty operating its new equipment, resulting in running at 30-35% of production capacity; and was losing business because it could not meet production demand. Tr. 11/24/04 at 11.

17. Because Polar NC, despite having state of the art production equipment, was experiencing difficulties, it sought additional financing and someone with marketing and sales expertise in the United States market. Tr. 11/24/04 at 10, 15, 49-51.

18. Cohen and Liebmann wanted to sell Polar NC; however, they had to make it profitable to attract prospective buyers. Tr. 11/24/04 at 49-51.

19. On March 2, 2001, Goldman sent a solicitation letter to Cohen in Mooresville, North Carolina. Tr. 11/18/04 at 11; *Stip. of Uncontested Facts* ¶ 20.

20. On March 7, 2001, following up on discussions instigated by Goldman's letters, Cohen sent Goldman past and current financial statements for Polar NC and PPL with some product brochures. 11/18/04 at 11; *Stip. of Uncontested Facts* ¶ 21.

21. On March 14, 2001, Colella sent Cohen a draft of Colmen's standard "Business Improvement Agreement" ("BIA"). *Stip. of Uncontested Facts* ¶ 22.

22. After changes requested by Cohen were made, the BIA was executed on April 30, 2001. *BIA* ¶ 1 (Colmen Ex. 1); Tr. 11/18/04 at 17; *Stip. of Uncontested Facts* ¶ 23.

23. The BIA was signed by Colella for Colmen; Cohen as CEO of PPI and Polpart, and as a director of 3488161; and Liebmann as a director of 3488161. Tr. 11/18/04 at 17; *Stip. of Uncontested Facts* ¶ 23.

24. The BIA contains a standard integration clause, providing that the agreement supersedes any prior oral or written understandings which may have existed between the parties. *BIA* § 6.9 (Colmen Ex. 1).

25. Under the BIA, Colmen had the following obligations and duties to perform in connection with Polar's United States operation: (1) formalize the Board of Directors involvement and responsibilities; (2) establish a strategic business plan; (3) develop an annual operating plan that supports the strategic plan; (4) implement day to day business and management accountability; (5) formulate a corporate finance structure that complements the business improvement issues; (6) develop a strategic plan for the eventual sale of Polar's United States operation; and, (7) actively seek out new business

relationships. Tr. 11/18/04 at 127-130; Tr. 11/24/04 at 111; *BIA* at 1 (Colmen Ex. 1)

26. Colmen's compensation consisted of three components: (1) a monthly management fee for running the Polar NC operation; (2) a brokerage fee, known as a Lehman fee; and, (3) options to acquire from 3488161 20% of the common stock of each PPI and Polpart. Tr. 11/18/04 at 18; *BIA* § 3.3 (Colmen Ex. 1).

27. The management fee was set at \$22,000.00 per month. Tr. 11/18/04 at 18; *BIA* § 3.3.1 (Colmen Ex. 1).

28. The Lehman fee was based upon a sliding scale percentage of the sale price, with the percentage decreasing as the sale price increased, and was payable for any merger, acquisition or divestiture transaction, including a sale of assets, within 18 months of the termination of the BIA that resulted from "Colmen's efforts." Tr. 11/18/04 at 18; *BIA* § 3.3.3 (Colmen Ex. 1).

29. The BIA directed the issuance to Colmen of options to acquire 100 common shares of the 500 issued and outstanding shares of Polpart and 200 common shares of the 1000 issued and outstanding shares of PPI from 3488161. *BIA* § 3.3.2 (Colmen Ex. 1)

30. The stock options were exercisable 50% within 45 days of execution of the BIA and the balance one year and one day after the execution of the BIA. Tr. 11/18/04 at 18; *BIA* § 3.3.2 (Colmen Ex. 1).

31. After Colella reviewed the Polar companies' financial statements, the parties agreed that all the Polar entities were worth approximately \$7.5 million (USD), 20% of which is \$1.5 million (USD), the agreed upon option strike price. Tr. 11/18/04 at 19-23; Tr. 11/24/04 at 52-53.

32. The option was to allow the designees to participate in the increased value of the option. Tr. 11/18/2004 at 18-19.

33. The parties contemplated that any future increase in the value of the companies was to be offset by the \$1.5 million (USD) when Colmen exercised the options. Tr. 11/18/04 at 19-23; Tr. 11/24/04 at 52-53.

34. The BIA provided that the Option Agreement must “contain cashless exercise provisions.” *BIA* § 3.3.2 (Colmen Ex. 1).

35. The parties contemplated that upon exercising the option, the beneficiaries would receive the difference between the value of the agreed upon strike price and the value of the stock at the time of the exercise. *Id.*¹

The Option Agreement

36. The Option Agreement (“Option Agmt.”), drafted by Cohen and executed some time after the BIA but “back” dated to May 1, 2001, was signed by Cohen, as director of 3488161, and Colella. *Option Agmt.* (Colmen Ex. 5); Tr. 11/18/04 at 24-26; Tr. 11/24/04 at 54-55; *Stip. of Uncontested Facts* ¶ 24.

37. The Option Agreement specifically references the BIA and recites the provisions setting the terms of the options. *Option Agmt.* (Colmen Ex. 5).

38. The Option Agreement granted the stock options to Colella, Brown, Goldman and James C. Hellauer, and fixed the option exercise price at \$1.5 million. *Option Agmt.* (Colmen Ex. 5).

39. The agreement between the parties did not contemplate the actual transfer

¹ Defendants’ do not dispute that the plaintiff’s definition “is one of the meanings” of a cashless option, but argue that there are other definitions. Tr. 11/24/04 at 58.

of shares of stock.

40. The portion of Colmen's compensation in the form of stock options was a payment based on the increased value of the Polar entities, not an actual exchange of stock certificates.

Colmen's Management of Polar NC

41. Colella participated in the management of Polar NC from May 2001 into 2003. *Stip. of Uncontested Facts* ¶ 16.

42. Brown became President and Chief Operating Officer of Polar NC effective July 9, 2001, and held those positions until October 2003. Tr. 11/18/04 at 151-52.

43. Brown visited the North Carolina plant several times a week and had an executive staff which reported to and consulted with him on decisions. Tr. 11/18/04 at 142-43, 148; *Stip. of Uncontested Facts* ¶ 17.

44. During his tenure, Brown obtained refinancing for the United States operation without pledging or otherwise affecting the assets of the Canadian company. Tr. 11/18/04 at 134-35.

45. Brown consulted regularly with Cohen on financing matters and with Liebman on marketing, sales, operations and equipment issues. Tr. 11/18/04 at 144-45.

46. In February 2003, Colmen arranged a sale-leaseback transaction with respect to one of Polar NC's North Carolina plants, using a portion of the funds from that transaction to reduce Polar NC's indebtedness to PPL Canada. *Stip. of Uncontested Facts* ¶ 31.

47. While under Colmen's management, Polar NC entered into a contract with National Premium Company to import raw materials from China. Tr. 11/18/04 at 201, 214-

15; Tr. 11/24/04 at 78.

48. During their management of the operations of Polar NC, Colmen, Colella, Brown and Hellauer acted professionally and competently in the best interests of the Polar companies.

The Lehman Fee

49. Liebmann and other Polar executives approved the National Premium contract. Tr. 12/1/04 at 310-11.

50. On August 2, 2002, Waddington North America (“WNA”) signed a letter of intent to purchase Polpart and PPI for \$70 million dollars. Tr. 11/18/04 at 96, 188; *Stip. of Uncontested Facts* ¶ 26.

51. WNA withdrew from the transaction in the fall of 2002 because it believed Polar NC was not performing well. Tr. 11/18/04 at 96.

52. In the early summer of 2003, Radcliffe Hastings and Michael Kennedy of Radnor Holdings Corp. (“Radnor”) contacted Brown, who was then the Chief Operating Officer of Polar NC, to inquire about a strategic alliance with Polar. Tr. 11/18/04 at 27-28, 137-39.

53. Brown advised Cohen of Radnor’s interest. Tr. 11/24/04 at 117.

54. On July 16, 2003, Colella sent an email to Cohen and Liebmann concerning a possible deal with WinCup Holdings Inc., a subsidiary of Radnor. Tr. 11/18/04 at 30; *E-mail from Colella to Cohen/Liebmann 7/16/03* (Colmen Trial Ex. 6).

55. Radnor representatives toured the North Carolina and the Montreal plants in August of 2003 with Colmen representatives. Tr. 11/18/04 at 29.

56. While discussions with Radnor were underway, Cohen informed Colmen that

he was taking over the negotiations and Colmen was no longer involved in them. Tr. 11/18/04 at 31-32.

57. On August 28, 2003, Cohen sent a letter to Colella terminating the BIA. *Letter from Cohen to Colella 8/28/03* (Colmen Ex. 8).

58. On November 11, 2003, PPI and Polar NC entered into an Asset Purchase Agreement with Radnor, whereby PPI and Polar NC agreed to sell substantially all of their assets to Radnor for a purchase price of \$28,725,284 (USD). *Asset Purchase Agmt.* (Polar Ex. 93).

59. Based on the purchase price of \$28,752,284, Colmen is owed a Lehman fee in the amount of \$387,252.84 (USD). *BIA § 3.3.3.* (Colmen Ex. 1).

Valuation of Colmen's Stock Option

60. On November 17, 2003, Colella advised Cohen that Colmen was exercising the options, and designated Brown, Colella, Goldman and Hellauer as designees to receive the options. Tr. 11/18/04 at 34; *Letter from Colella to Cohen 11/17/03* (Colmen Ex. 9).

61. On December 4, 2004, while acknowledging the designation of Brown, Colella, Goldman and Hellauer to receive the options, Cohen stated that he did not have enough information to calculate the value of the options. Tr. 11/18/04 at 34-35; *Letter from Colella to Cohen 11/17/03* (Colmen Ex. 9).

62. Because no actual transfer of shares was contemplated by the parties, minority and marketability discounts are not appropriate.

PPI Shares

63. The sale price of the assets of PPI and Polar NC was \$28,725,284 (USD). *Valuation of the Issued Shares of Polar Plastics Inc. as at November 17, 2003*, at 29

(Colmen Ex. 131) ("*Polar Plastics Valuation*").

64. The agreement not to compete is an appropriate component of the value of the company. Tr. 12/1/04 at 62-65.

65. The \$10 million (USD) promissory note given by Radnor as part of the purchase price shall be discounted to \$8 million (USD). Tr. 12/1/04 at 253-54.

66. The value of the working capital adjustment should not be added to the proceeds because Radnor continues to dispute that it owes any of the funds to PPI. Tr. 12/1/04 at 245-46.

67. The debt of \$11,223,037 (USD) on the assets assumed by Radnor must be deducted from the total proceeds. *Polar Plastics Valuation* at 29.

68. Tooling costs of \$3.8 million (USD), identified as a contingent liability owed to Polar's Canadian operation, need not be deducted from the valuation because it would simply add an offsetting increase in value to Polar Plastic Ltd. *Polar Plastics Valuation* at 30 n.5.

69. The total net liabilities of Polar NC's operations as of the sale date was \$6,195,206 (USD), which must be deducted from the total proceeds. *Polar Plastics Valuation* at 30.

70. The total fair market value of all shares, common and preferred, of PPI on November 17, 2003 was \$10,921,881 (USD).

71. To determine the total fair market value of the common shares of PPI, the preferred shares totaling \$6,900,000 (USD) must be deducted. *Polar Plastics Valuation* at 30; Tr. 12/1/04 at 262-63.

72. The fair market value of the common shares of PPI as of November 17,

2003, was \$5,078,041 (USD), calculated as follows:

\$28,725,284	Proceeds of sale to Radnor
\$2,671,000	Value of non-compete agreement
(\$2,000,000)	Deduction for present day value of Radnor note
(\$11,223,037)	Deduction for debt assumed by Radnor
(\$6,195,206)	Deduction for Polar NC's liabilities

\$11,978,041	FMV of all shares of PPI
(\$6,900,000)	Deduction of preferred shares of PPI

\$5,078,041	FMV of common shares of PPI

73. Colmen's 20% share of the outstanding common shares of PPI is \$1,015,608.20 (USD).

Polpart Shares

74. The fair market value of the common shares of Polpart is calculated on the value of its only asset, PPL. *Valuation of the Issued Shares of Polpart Placements Inc. as at November 17, 2003*, at 33 (Colmen Ex. 130) ("*Polpart Placements Valuation*").

75. The fair market value of issued shares of PPL, Polar's Canadian operation, as of November 17, 2003, was \$35,318,000 (CDN). *Polpart Placements Valuation* at 49.

76. The fair market value represents PPL's net cash flow capitalized at a multiple of 7.0 times, a reasonable and realistic factor, plus \$738,000 (CDN), the tax shield on depreciable capital assets. *Polpart Placements Valuation* at 49.

77. To calculate the fair market value of the shares of Polpart Placement Inc. as of November 17, 2003, the 2003 Shareholders' Equity of \$17,997,545 (CDN) is added to the fair market value of issued shares of Polar Plastic Ltd., \$35,318,000 (CDN), less the book value of Polpart's investment in PPL, or \$18,000,000 (CDN). *Polpart Placements Valuation* at 46; Tr. 12/1/04 at 111.

78. The \$9,390,829 (CDN) in interest bearing debt accumulated by PPL must be deducted from the fair market value of issued shares of PPL before arriving at the fair market value of the shares of Polpart. Tr. 12/1/04 at 280.

79. After the appropriate calculations, the fair market value of all shares of Polpart as of November 17, 2003, was \$25,924,716 (CDN).

80. In April 2003, without Colmen's knowledge, Polpart authorized an \$18 million (CDN) dividend to the preferred shareholders. *Resolution of the Directors of Polpart Placements Inc., Effective April 8, 2003* (Polar Ex. 84). Tr. 11/24/04 at 107, 121.

81. The dividend, in the form of \$18 million of new Class A shares of Polpart, was issued to all common shareholders of record in Polpart as of March 31, 2003, before Colmen exercised its stock options. *Resolution of the Directors of Polpart Placements Inc., Effective April 8, 2003* (Polar Ex. 84).

82. Although Colmen held an option to acquire 20% of common shares in Polpart, it was not a common shareholder in Polpart as of March 31, 2003.

83. At the time the parties signed the BIA, Polpart had retained earnings of \$17,997,045 (CDN). *Valuation of the Issued Shares of Polpart Placements Inc. as at November 17, 2003*, at 48 (Colmen Ex. 130).

84. The issuance of the dividend reduced Polpart's retained earnings by \$18 million (CDN). *Valuation of the Issued Shares of Polpart Placements Inc. as at November 17, 2003*, at 48 (Colmen Ex. 130).

85. The \$18 million dividend (CDN) declared by Polpart was illusory and had the effect of reducing the value of Colmen's option. Tr. 11/24/04 at 70-71, 102, 109.

86. The \$18 million dividend (CDN) shall not be deducted from the fair market

value of Polpart's shares.

87. On November 17, 2003, one Canadian dollar was the equivalent of 76% of one United States dollar. <http://www.bankofcanada.ca/en/rates/exchform.html>

88. As of November 17, 2003, the fair market value of the common shares of Polpart was \$25,924,716 (CDN) or \$19,702,784 (USD), calculated as follows:

\$35,318,000	FMV of issued shares of PPL
(\$9,390,829)	Deduction for interest bearing debt of PPL
\$17,997,545	2003 Polpart Shareholder's Equity
(\$18,000,000)	Book value of Polpart investment in PPL

\$25,924,716	FMV of all Polpart shares on November 17, 2003 (CDN)
.76 to 1	Conversion rate of CDN to USD

\$19,702,784	FMV of all Polpart common shares in USD

89. Colmen's 20% share of the outstanding common shares of Polpart is \$3,940,556.80 (USD).

90. The total value of Colmen's options in PPI (\$1,015,608.20) and Polpart (\$3,940,556.80) is \$4,421,965 (USD).

91. The value of Colmen's option must be offset by the \$1.5 million strike price, resulting in a payment due Colmen of \$3,456,165 (USD).

92. Colmen has been paid its management fee, but has not been paid the Lehman fee or the value of the stock options. Tr. 11/18/04 at 40.

CONCLUSIONS OF LAW²

1. When the parties executed the BIA, they entered into an enforceable contract under Pennsylvania law. *Stip. of Undisputed Facts* ¶¶ 23-24.

² At trial, Colmen withdrew Counts VI and VII. Polar withdrew Counterclaim V prior to trial and Counterclaim VI at trial.

2. A court should look to the written integrated agreement for guidance in interpreting the contract. *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir. 1995).

3. Interpreting a contract is ascertaining the “objectively” manifested intentions of the parties. *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107,111 (3d Cir. 1994).

4. It is assumed that the parties’ intent is contained in the writing itself. *Duquesne Light Co.*, 66 F.3d at 613.

5. When the words of a contract are clear and unambiguous, the intent is formed in the express language of the agreement. *Hullett*, 38 F.3d at 111.

6. Discerning the intent of the parties is not confined to the document itself; the contract must be read in the context of the transaction. *Pacitti v. Macy’s*, 193 F.3d 766, 773 (3d Cir. 1999).

7. A cashless provision allows the option holder to exercise the option without having to pay the exercise price which is deducted from the proceeds.

8. The finder of fact may weigh the credibility of one expert over another and credit one expert report over another; and may accept all, some or none of an expert’s opinions. *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 185-86 (3d Cir. 2004); *In re Cendant Corp. Litigation*, 264 F.3d 201, 253-54 (3d Cir. 2001).

9. The business judgment rule insulates corporate officers or directors from liability for decisions made: (1) in good faith; (2) where the director does not have self-interest in the subject matter of the decision being made; (3) with a reasonable and informed basis under the circumstances; and, (4) the director rationally believes the

business judgment is in the best interests of the corporation. *Viener v. Jacobs*, 834 A.2d 546, 557 (Pa. Super. Ct. 2003) (citing *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997)).

10. Polar has not demonstrated that Colmen, as manager of Polar NC, entered into the National Premium contract in bad faith, self-interest or lacked a reasoned and informed basis.

12. Colmen Capital Advisors, Inc., Peter Colella, Jr., George Brown III, James Hellauer, and Elliot L. Goldman did not breach (a) any contractual obligations to Polar; (b) any covenant of good faith and fair dealing, or (c) any fiduciary duty owed to the Polar parties.

13. Under the BIA, Colmen, as prevailing party in this litigation, is entitled to recover attorney's fees and costs.

/s/
TIMOTHY J. SAVAGE, J.

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	:	
v.	:	
	:	
COLMEN CAPITAL ADVISORS, INC.,	:	
PETER COLELLA, JR., GEORGE	:	
BROWN, III, JAMES HELLAUER	:	
and ELLIOT L. GOLDMAN	:	

ORDER

AND NOW, this 26th day of July, 2005, after a nonjury trial and upon consideration of the Findings of Fact and Conclusions of Law, it is **ORDERED** as follows:

1. **JUDGMENT IS ENTERED** in favor of plaintiff Colmen Capital Advisors, Inc., and against defendants Polar Plastics, Inc., Polpart Placements Inc., and 3488161 Canada, Ltd., in the amount of \$387,252.84 on Count I of the complaint.

2. **JUDGMENT IS ENTERED** in favor of plaintiff Colmen Capital Advisors, Inc. and against the defendants Polar Plastics, Inc., Polpart Placements Inc. and 3488161 Canada, Ltd. in the amount of \$3,456,165.00 on Counts II and III of the complaint.

3. **JUDGMENT IS ENTERED** in favor of defendants Polar Plastics, Ltd. and Polar Plastics, (NC), Inc. and against the plaintiff on Counts II and III of the complaint

4. **JUDGMENT IS ENTERED** in favor of all defendants and against the plaintiff

on Counts IV and V of the complaint.

5. **JUDGMENT IS ENTERED** in favor of counterclaim defendants Colmen Capital Advisors, Inc., Peter Colella, Jr., George Brown, III, and James Hellauer and against the defendants Polar Plastics, Inc., Polpart Placements, Inc., Polar Plastics, Ltd., 3488161 Canada, Ltd., and Polar Plastics, (NC), Inc., on Counts I, II, III, IV, VII and VIII of the Counterclaim.

6. Any motion for attorney's fees may be filed in accordance with FED R. CIV. P. 54.

_____/s/_____
TIMOTHY J. SAVAGE, J.